

CHESTER I. BISHOP
BETTY L. BISHOP

IBLA 73-175

Decided December 10, 1973

Appeal from a decision by Administrative Law Judge Dent D. Dalby cancelling appellants' respective desert land entries, I-05069, I-05070.

Affirmed.

Desert Land Entry: Cancellation

A desert land entry is properly cancelled when it is determined that the original entryman had abandoned his entry prior to its allowance and did not intend to reclaim the land for his own use.

APPEARANCES: T. H. Church, Esq., Church, Church & Snow, Burley, Idaho, for appellants; Riley C. Nichols, Esq., Field Solicitor's Office, Department of the Interior, Boise, Idaho, for the United States.

OPINION BY MR. RITVO

Chester and Betty Bishop have appealed from a decision by Administrative Law Judge Dent D. Dalby, dated October 12, 1972, holding desert land entries I-05069 and I-05070 cancelled on the ground that the entries were not made and maintained in good faith in that the original entrymen, the Bishops' assignors, had, prior to allowance, abandoned the entries and any intent to reclaim, irrigate and cultivate the lands.

The original entrymen, Dennis and Phebe Biggers, filed applications I 5069 and I 5070 on April 23, 1954, to make desert land entry, pursuant to 43 U.S.C. § 321 (1970). In March 1963, the Secretary of the Interior approved classification of the subject lands as suitable for desert land entry upon a showing of adequate irrigation water.

As the applicants, Dennis and Phebe Biggers, had indicated they would use subterranean water for irrigation, they were given special land use permits for a period of one year within which to demonstrate the existence of an adequate supply of water for each potential entry, failing in which the desert land application would be rejected. Satisfactory showing of a water supply from drilled wells having been made by Clarence Bishop for each application, the entries were allowed: I 5069 on June 26, 1964; I 5070 on October 15, 1964. The contestees, Chester and Betty Bishop, acceded to the entries by assignment in 1966, and made final proofs for each entry in 1968.

In 1970 the government filed contest complaints against the entries charging, among other things, that the entries were not made and maintained in good faith and that the contestees had not intended to reclaim the land for their own use and benefit. A hearing on the contest was held in Burley, Idaho, on December 2, 1971, before Judge Dalby.

An entryman must have the requisite good faith intention to reclaim the land for his own use and benefit at the time the entry is allowed. United States v. Shearman, 73 I.D. 386, 425 (1966), aff'd sub nom. Reed v. Morton, ___ F.2d ___, No. 71-1187 (9th Cir. June 4, 1973). If it is later discovered that an entryman did not have the requisite intention to reclaim the land, the entry is subject to cancellation for "illegal inception" pursuant to 43 U.S.C. § 329 (1970), which reads in pertinent part:

Provided however * * * the claims or entries * * * shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law * * *.

Judge Dalby, having found that the entrymen, prior to allowance, had abandoned the entries and any intent to reclaim the land, held the entries cancelled. His decision contains a complete and accurate statement of the facts and law pertinent to this case. The Board finds itself in complete agreement with his decision, a copy of which is attached hereto. 1/

On appeal, appellants maintain that the Administrative Law Judge erred in finding from the evidence that Dennis and Phebe Biggers abandoned their intention to reclaim the land for their own use and benefit prior to the time the entries were allowed. Appellants argue that the Administrative Law Judge (a) failed to give any

1/ See attachment.

weight to a good part of the evidence consisting of documents, records and files of the case, and failed to give any weight whatsoever to the testimony of witnesses other than Mr. Biggers, (b) failed to take into consideration the fact that Mr. Biggers was approximately 83 years old and "was mixed up, muddled (sic) in his memory and probably suffered from senility at the time the deposition was taken," 2/ and (c) improperly concluded that Mr. Biggers' testimony should be credited over Clarence Bishop's testimony due to the fact that some statements made by Bishop were inconsistent with testimony given at the hearing regarding the amount charged for drilling wells on the entries.

The evidence indicated, and the Judge found, that Dennis and Phebe Biggers obtained special land use permits to drill wells on lands covered by their applications, the permits to be effective from June 10, 1963, to June 10, 1964. Exhibit G-1, Doc. 12c. The permits were issued to allow the entrymen an opportunity to show that a water supply could be obtained for reclamation of the entries. The permits contained stipulations that failure to discover a sufficient quantity of water by the expiration date would result in the rejection of the desert land applications. Mr. Biggers testified on deposition that he and his wife abandoned their intentions to develop the land they had applied to enter after they were informed by a Bureau of Land Management employee that they only had 30 days remaining under the permits in which to drill the wells and prove that they had obtained a supply of water. Exhibit G-7, at 5 through 12, 15, 17.

Appellants' contention is that the Administrative Law Judge incorrectly chose to believe Mr. Biggers' testimony. Appellants request, in essence, that we find the following:

[I]n 1963 Mr. and Mrs. Biggers applied for and received Special Land Use Permits; that prior to the time of the expiration of these Special Land Use Permits they engaged and contracted with C. (Clarence) D. Bishop to drill wells on the Desert Land Entries; that after the Desert Land Entries were allowed, Mr. and Mrs. Biggers determined that they did not desire to prove up on the Desert Land Entries and desired to sell their interest in the same. 3/

The evidence on the issue of whether the original entrymen had abandoned the entries prior to allowance was conflicting. Upon review of the complete record, we do not agree with appellants'

2/ Appellants' Statement of Reasons for Appeal, at 2.

3/ Appellants' Statement of Reasons for Appeal, at 11.

argument that the Administrative Law Judge did not consider or give sufficient weight to certain evidence. The Judge's ultimate findings of fact were based upon all the evidence presented to him at the hearing, as he so stated in his decision. ^{4/} While the Judge did not mention certain facts, omissions of reference to particular testimony or exhibits does not signify a failure to consider them. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973); United States v. Zerwekh, 9 IBLA 172, 175 (1973); Navajo Tribe of Indians v. State of Utah, 12 IBLA 34, 80 I.D. 441, 456 (1973). We have reviewed the record carefully and find that the Judge's conclusion is correct.

In addition to arguing that the Judge did not give sufficient weight to certain evidence and to the testimony of witnesses other than Mr. Biggers, appellants also argue that the Judge failed to take into consideration the fact that Mr. Biggers was elderly, confused, and possibly senile at the time his deposition was taken. As pointed out by the contestant, counsel for the appellants was present at the deposition-taking but made no objection to the competency of the testimony or of the witness and asked no questions himself on cross-examination. The contestant urges that it is the peculiar province of cross-examination to discredit a witness or testimony or to lay the foundation for impeaching him through testimony of another witness. Since appellants' attorney did not avail himself of this opportunity, the contestant argues that he should not now be permitted to make unsupported assertions in an effort to discredit the testimony of the witness. The Board is in agreement with this contention. See 5 Wigmore, On Evidence, § 1371 (3rd ed. 1940), and cases cited therein. Furthermore, the record indicates that the Administrative Law Judge considered appellants' cautioning remarks regarding Mr. Biggers' competency when he evaluated the testimony:

HEARING EXAMINER DALBY: * * * Do you have any objection to the deposition?

MR. CHURCH: Not to the admission as such, but I ask that the court be cautioned as to the answers in this because of his age and infirmity.

* * * * *

HEARING EXAMINER DALBY: Well, G-7 is received in evidence and I will consider your remarks and evaluate him when I read it. (Tr. 20-21).

Appellant finally argues that the Administrative Law Judge improperly concluded that Mr. Biggers' testimony should be credited

^{4/} See Judge Dalby's decision, at 8.

over Clarence Bishop's testimony due to the fact that annual proof statements signed by Bishop under oath were inconsistent with testimony given by him at the hearing with respect to the cost of drilling wells on the entries. Appellants argue that any discrepancy between statements made by Clarence Bishop and his testimony as to drilling costs is of no significance because the government is "only interested in whether or not a minimum amount is expended for reclaiming the lands." ^{5/} Appellants have apparently missed the reasoning behind the Judge's emphasis of this matter in his decision. The Judge did not evaluate the conflicting testimony in order to determine whether minimum requirements had been met for the issuance of patents on desert land entries. Rather, he properly considered the inconsistencies in assessing the credibility of the witness and his testimony. We agree with his assessment of the evidence.

The Board concludes that the original applicants, Dennis and Phebe Biggers, had abandoned their intention to reclaim the land prior to the allowance of the entries and that they, at no time after the entries had been allowed, expended any money for necessary reclamation, irrigation and cultivation of the entries. The desert land entries were properly cancelled when it was determined that the original entrymen did not intend to reclaim the land for their own use and benefit at the time of entry. ^{6/} See *Chaplin v. United States*, 193 F. 874, 881 (9th Cir. 1912), cert. denied, 225 U.S. 705 (1911); *Elaine S. Stickelman*, 9 IBLA 327, 331 (1973); *United States v. Shearman*, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Martin Ritvo, Member

We concur:

Douglas E. Henriques, Member

Anne Poindexter Lewis, Member

^{5/} Appellants' Statement of Reasons for Appeal, at 12.

^{6/} Since we find the entries were properly cancelled for this reason, we do not address ourselves to the other charges raised by the complaint. However, we do not intend to raise any implication that the other charges are without merit.

U.S. Department of the Interior
Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84111

October 12, 1972

DECISION

UNITED STATES OF AMERICA,	:	IDAHO 05069
	:	
Contestant	:	Involving desert land entry
	:	situated in S<2>SE<4>, Sec. 33,
v.	:	T. 13 S., R. 27 E., and
	:	SW<4>NE<4> Lots 1 and 2, Sec. 4,
CHESTER I. BISHOP,	:	T. 14 S., R. 27 E., Boise
	:	Meridian, Cassia County,
Contestee	:	Idaho
	:	
.....	:	
UNITED STATES OF AMERICA,	:	IDAHO 05070
	:	
Contestant	:	Involving desert land entry
	:	situated in S<2>NE<4>, N<2>SE<4>,
v.	:	Sec. 33 and S<2>NW<4>, N<2>SW<4>,
	:	Sec. 34, T. 13 S., R. 27 E.,
BETTY L. BISHOP,	:	Boise Meridian, Cassia County,
	:	Idaho.
Contestee	:	
	:	
.....	:	

This proceeding was initiated by the filing of separate complaints seeking cancellation of the Contestees' desert land entries. Each complaint contains the charge, among others, that the entry was not made and maintained in good faith in

that the Contestee, or his assignor, had no intent to reclaim, irrigate and cultivate the land for his own use and benefit.

Each Contestee answered denying this and other allegations.

A hearing was held at Burley, Idaho, on December 2, 1971. The Contestant was represented by Mr. Riley C. Nichols, Office of the Solicitor, United States Department of the Interior, Boise, Idaho. The Contestees were represented by Mr. Thomas H. Church, Church, Church and Snow, Burley, Idaho.

FINDINGS AND CONCLUSIONS

Dennis D. Biggers and his wife, Phebe F. Biggers, filed applications on April 23, 1954, for desert land entries pursuant to Section 1 of the Act of March 3, 1877, as amended, 19 Stat. 377, 43 U.S.C. § 321. These were but two of approximately forty applications for entry in the general area of the Raft River drainage.

Since passage of the Taylor Grazing Act of 1934, 48 Stat. 1272, 43 U.S.C. § 315, et seq., an entry on public lands cannot be made until such lands have been classified and the entry allowed. Section 7 of that Act, 43 U.S.C. § 315f, provides:

Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry . . . The Applicant, after his entry . . . is allowed, shall be entitled to the possession and use of such lands . . .

Protests were entered to classification for entry of the land covered by the 40 applications. The matter was in litigation for an extended period but in March 1963, the lands were favorably classified. On March 22, 1963, the Idaho Land Office issued a decision inviting the Applicants to obtain special land use permits to drill wells on the entries applied for. The decision states that, "It should be born in mind that allowance of any of the desert land or homestead applications is wholly dependent upon the ability of each respective applicant to obtain an adequate water supply . . . If adequate water is not found during the life of the special land use permit, the desert land . . . applications (which will be suspended during the time the permit is in effect) will be rejected . . ."

The Biggers applied for and were issued special land use permits for the period from June 10, 1963, to June 10, 1964, which contained stipulations that failure to discover a sufficient quantity of water by the expiration date would result in the rejection of the desert land applications.

Clarence D. Bishop, a well driller residing in Burley, Idaho, drilled three wells to service the entries in May 1964.

On June 3, 1964, Mr. Thomas H. Church filed an amended application for Phebe Biggers which included the 40-acre subdivision on which one well had been drilled. Dennis Biggers' entry was allowed on June 26, 1964, and Phebe Biggers' on October 15, 1964. In July and August of 1965, annual proofs were submitted on behalf of the Biggers by Mr. Church. The annual proofs showed expenditures of \$22,800 for drilling wells and \$1,000 for clearing brush on the two entries.

Pursuant to arrangements made by Clarence Bishop, the Biggers quitclaimed the entries on April 11, 1966, to Chester Bishop, Clarence's nephew, and Betty Bishop, Chester's wife. Clarence Bishop paid the Biggers \$1,000 for their entries. In September 1966, Chester and Betty Bishop executed a promissory note to Clarence Bishop for \$43,200, secured by a mortgage on the entries. The note was ostensibly given to evidence Chester and Betty Bishop's obligation to pay Clarence Bishop for the development work previously performed on the entries. The note required payment in three annual installments of \$14,400, the first due on December 1, 1966.

In 1967, Clarence Bishop negotiated with Willard Yates to lease the entries. Yates, a Utah resident, had purchased a farm adjoining the entries the year before and had conducted farming operations there. Culminating these negotiations, Chester and Betty Bishop leased the entries to Yates. Yates agreed to provide electrical energy to the entries prior to March 1, 1968, to purchase and install pumps and motors on the three wells and to construct an irrigation system prior to April 15, 1968, to plant crops on 40 acres of each entry prior to May 15, 1968, and to irrigate the crops at least once prior to June 1, 1968. Yates also agreed to pay annual rental of \$5,000 by December 31 of each year, the first payment to be due December 31, 1968. The Bishops agreed to give the lessee a promissory note and mortgage for the cost of the pumps and motors upon presentation of an itemized statement with the right to offset the lease payments against the note.

In compliance with the provisions of the lease, Yates entered into two agreements with the Raft River Electrical Cooperative to install power lines and purchase electricity. He agreed to purchase electrical energy for a period of not less than eight years. Yates represented in the agreements that he was owner of the two entries. Yates purchased and installed pumps and motors, leveled the land and constructed the necessary irrigation ditches. He farmed the entries every year beginning in 1968. On May 21, 1968, Chester and Betty Bishop executed a \$20,000 promissory note to Yates secured by a mortgage on the entries for the improvements that Yates had made. The note was payable in three annual installments of \$6,666.66 each, plus accrued interest, the first installment due May 21, 1970.

Chester and Betty Bishop gave final proof on the entries on July 3, 1968. The "legalities" involved in making final proof was handled by Clarence Bishop and Mr. Church. The final proof form shows total cost of \$41,732 for improvements on both of the entries, with only \$15,232 attributable to the cost of drilling and casing the wells.

During all of these proceedings, except for the payment of \$1,000 to Dennis and Phebe Biggers, no money changed hands among the parties. Chester and Betty Bishop made no payments on their notes to Clarence Bishop and Yates. Yates made no rental payments to the Bishops. Chester and Betty Bishop did not participate in any way in the development of the entries and did not expend any of their own funds for reclamation. Their participation consisted solely of executing the notes, mortgages and lease.

At the time of the Hearing, Yates was still farming the land. The parties apparently had no clear understanding as to how much money was due under the agreements they had executed. Yates testified that he had discussed the matter of deferring rental payments with Clarence Bishop and that it was intended that a new arrangement would be made for development of the lands after patents were issued. Yates also testified that he had some discussion with Clarence Bishop and Mr. Church about purchasing the two entries, but no agreement was reached because they understood it was against the law. Chester Bishop testified that he and his wife intended to allow Yates to continue to lease the entries in the future.

The Desert Land Act provides, 43 U.S.C.:

§ 321 It shall be lawful for any citizen of the United States . . . to file a declaration under oath . . . that he intends to reclaim a

tract of desert land not exceeding one-half section, by conducting water upon the same . . .

§ 327 At the time of filing the declaration . . . the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation . . .

§ 329 . . . Provided, however, . . . the claims or entries . . . shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law . .

A desert land entryman must intend in good faith to reclaim the land for his own use and benefit at the time he makes the entry, Chaplin v. United States, 193 F. 874 (9th Cir. 1912), cert. denied 225 U.S. 705; United States v. Ollie Mae Shearman, 73 I.D. 386 (1966). In Chaplin, the court said (at pp. 881, 882):

These two provisions [§ 321 and § 327] clearly mean that the entryman can make no entry except a bona fide entry with the intention to reclaim the land, that he shall not only have bona fide such definite intention, but that he shall have in mind a plan of contemplated irrigation, as well as an adequate source of water . . . It was clearly not the intention of Congress to offer the desert lands to entry to persons who were to be dummies for others, or to persons who had no intention to occupy the land for the purposes for which it was offered, but whose intention was to hold it temporarily merely for the purposes of speculation or for the benefit of some other person. Why does the act of Congress require the entryman to take the solemn oath that he intends to reclaim the land, unless that intention is of the very essence of the condition upon which his entry is permitted? He certainly cannot be said to intend to reclaim through the future acts of his assignee. He can know nothing of what his assignee may do, nor can he be made answerable for his assignee's act or failure to act.

The question here is whether the Biggers intended to reclaim the land for their own use and benefit at the time of entry in June and October 1964. Dennis Biggers testified, in a September 21, 1971 deposition, that, at the time he filed his application, he intended to establish a farm on the entries and that he had been promised a loan for development by the Production Credit Association. He stated, however, that by the time the special land use permits were issued he was out of touch with the loan company and decided not to drill wells on the entries. With respect to the well drilling, he testified (Ex. G-7, pp. 7, 8):

Q Now under these permits, did you and your wife ever have any wells drilled on your entries, under these permits which you received from the Bureau of Land Management?

A No, I didn't. I studied about it, debated it in my own mind, but didn't make any decision.

Q Did you hire someone to drill wells on the entries?

A I don't think I did. We talked about it.

Q Did you know, Mr. Biggers, that after that time that there [were] three wells drilled on the two desert land entries of you and your wife?

A After that?

Q After you got your special land use application filed?

A I heard that they had, but I didn't drill them.

Q Did you hear who had drilled the wells?

A No, I don't believe I did.

Q Did you at any time make any arrangements with anyone to have any wells drilled on these entries?

A Well, I talked with Mr. Bishop, we talked about it, and he offered to go ahead, but he would take the risk on me, and I was where I didn't want to, the thirty days was what was bothering me, and I didn't want to lose that money. I didn't want to put wells on that and lose it, and I had been told that I would.

Q Did you offer to pay him anything for drilling the wells?

A No, I told him that it looked like I had been froze out. The thirty days, it looked to me like they meant for somebody else to have the land.

Clarence Bishop presented a different verison. He testified (Tr. 70-81):

Q Now, did you have any agreement with Mr. and Mrs. Biggers to pay you for your services in drilling these wells?

A Yes.

Q Would you state what your agreement was.

A Well, Mr. Biggers came to my house and told me that he wanted to go ahead with these entries, and he knew that I was a driller. We had met before that, and he asked me if I could go ahead and drill these wells, but that he had a very short time to get the wells in production or protested or something. We finally came to an agreement and proceeded.

* * *

Q Now, you say he came to an agreement. What was the agreement that you came to?

A He said that he was real short of time to get these wells put down. I was to receive \$14.00 a foot for my drilling, because we was having to make an extreme effort to get this done in the period of time he thought he had. And I was to receive \$7.00 a foot for any pipe that I installed.

* * *

Q Had you demanded payment up to that time [of assignment] from Mr. and Mrs. Biggers?

A I hadn't pressed him, no.

Bishop's testimony as to the existence of an agreement with Biggers to pay for the well drilling is not consistent with Bishop's conduct subsequent to the alleged agreement. If he had an agreement with Biggers to drill and case the wells, one would expect him to demand payment or at least the execution of a note and mortgage to secure payment. He did neither. He waited for two years, until Chester and Betty Bishop acquired the entries, to obtain security for his work. Bishop's failure to demand payment or security from Biggers would be consistent with the existence of an agreement or understanding between them that, after allowance, the entries were to be assigned.

There is a further inconsistency between Bishop's testimony and other evidence in the record. According to Bishop, he was to receive \$21 per foot for the well drilling (\$14 per foot for drilling and \$7 per foot for casing). His well logs show drilling of 1,675 feet for the three wells. This would amount to a total cost of \$35,175. Yet the annual proof, which Clarence Bishop signed as witness, lists the cost of \$22,800 and the final proof, which he helped prepare, shows it at \$15,232.

For these reasons, I credit Dennis Biggers' testimony, quoted above, and find, on the basis of that and the other evidence presented, that the Biggers, prior to allowance, had abandoned the entries and any intent to reclaim the land.

The entries are, therefore, cancelled.

Dent D. Dalby
Administrative Law Judge

